

UNITED STATES TAX COURT
400 SECOND STREET N.W.
WASHINGTON, D.C. 20217

OFFICE OF THE
COURT ADMINISTRATOR
(202) 376-2751

September 2, 1986

Gary F. Davis
Office of Regional Counsel
General Services Administration
Room 7048
7th and D Streets, S.W.
Washington, D.C. 20407

Dear Mr. Davis,

Pursuant to your conversation with Jennifer Rudy, staff attorney in my office, I am setting forth the specific items that Chief Judge Sterrett requested from GSA during a meeting on August 18, 1986. At the meeting, GSA was represented by Jerry Kaplan, Tom Stapleton, Darrell Kosisky and Mike Penn, the building manager.

The issues discussed herein have arisen because of the continuous problems the Court faces with people littering the plaza area adjacent to our building, consuming liquor on the property, sleeping on the plaza, and destroying the lawn and trees.

(1) The Court requests that GSA provide a written opinion as to the legality of constructing a fence around the plaza area to prevent all persons, except maintenance personnel, from entering onto the property. No fence specifications have been developed, although an early suggestion was for a four and one-half foot wrought iron picket fence. If construction of such a fence is legal, the Court may solicit recommendations for types of fence material and structure. At the meeting, GSA stated it would not conduct the procurement for the fence; the Court agreed to be responsible for the contract if GSA determines that the fence would be legal.

(2) Whether or not construction of a fence is lawful, the Court wishes to post the plaza area off limits from dusk until dawn. The Court needs a written opinion from GSA that this posting would be legal.

(3) The Court asks that GSA authorize or delegate it to proceed with construction of the fence and posting the area. The Court will bear the financial costs associated with these actions.

(4) The Court also requests that GSA contact the District of Columbia Government and obtain its approval for construction of the fence and posting of the property, as required under D.C. Formal Agreement No. HT 7308, dated November 8, 1973, with which I understand you are familiar.

As you are aware, the Court is concerned with the ongoing sanitary and health problems posed by the present situation. We are willing to make an effort to alleviate the problems and bear the attendant costs. However, we cannot proceed without GSA's determination that the proposed actions are lawful or without GSA's authorization for us to proceed to implement these plans.

I look forward to receiving your response. Please contact me if you have any questions. Your assistance in this matter is appreciated.

Sincerely,

Paul Nejelski

Paul Nejelski
Court Administrator

cc: Chief Judge Sterrett

OFFICIAL

4/29/86

APR 29 1986

Dear Chief Judge Sterrett,

In response to your letter of April 9, 1986, please find enclosed D.C. Formal Agreement No. HT7308, dated November 8, 1973. This document gave the General Services Administration (GSA) the air rights over the Interstate right-of-way to construct and maintain the pedestrian plaza that is adjacent to the Tax Court Building. Also enclosed is a plat map that is highlighted to show what is owned by GSA--including the Tax Court Building.

It is important to note that prior to implementing any of the projects mentioned in your letter the District of Columbia be notified, and the conditions of the Formal Agreement, specifically those referenced in Article 1, be met.

If there are any further questions regarding this matter, they may be directed to Mr. Tom Stapleton of my staff on 472-1704.

Sincerely,

(signed) Rodgers A. Stewart

WILLIAM B. JENKINS
Director,
Real Estate Division

Samuel B. Sterrett
Chief Judge
United States Tax Court
Washington, DC 20217

Enclosures
Concurrence:

WPELR: Ray Eckert DATE 4/28/86

WPEL: William B. Jenkins DATE 4/28/86

WPED: _____ DATE _____

cc: Official & Reading Files (WPELR)

WPFN, WPFNR, WL, WA, WPE, WPEL

WPELR: TStapleton:TH:4/17/86:OL disk:Tax-Court.Plaza

9/22/86

Dear Judge Sterrett:

The following serves to document agreements reached at our August 18, 1986, meeting and also responds to the agenda items.

Mr. Randy Lash, Director of the Federal Protective Service, has agreed to increase surveillance during high visibility hours as well as at night. Additionally plain clothes officers will periodically go through the plaza area. As suggested at our meeting you may want to formally request increased surveillance by the D.C. Metropolitan police as this area enjoys concurrent jurisdiction.

The sprinkler contract has been awarded and is scheduled to be completed October 30, 1986.

Mr. Michael Penn has agreed to ensure the vents over the highway are cleaned quarterly.

I expressed at our meeting that the General Services Administration (GSA) did not wish to enjoin the Tax Court in construction of a fence on parts of the plaza. The contract package we prepared for the fence has been forwarded to Mr. Paul Nejelski, Court Administrator, to be used under the Tax Courts delegated authority to accomplish reimbursable projects under \$25,000. Additionally GSA would not seek community support for the fence project nor would it defend it publicly once it is constructed. As discussed there is an obvious need and requirement for fencing and posting, but the overall success of such an endeavor can be better addressed by the Tax Court.

At our meeting Mr. Thomas Stapleton promised that he would provide to you a written GSA determination from a legal property standpoint, (not merits) as to whether a fence could be constructed on the plaza. Mr. Stapleton was also to contact the District of Columbia Government for its approval of the fence as required by Formal Agreement No. RT7308 dated November 8, 1973. GSA's authorization/involvement was to be limited to expressing a legal opinion concerning fencing real property and to forward the proposal for fencing and posting to the D.C. Government.

By letter of September 2, 1986 Mr. Nejelski has written our Regional Counsel further clarifying your requests. I have forwarded a copy of this letter to them and have encouraged a prompt reply.

I truly enjoyed meeting you and anytime Mike Penn or I can be of assistance we will be eager and available.

Sincerely,

JEROME A. KAPLAN
Manager, North District (WPFN)

The Honorable
Samuel B. Sterrett
Judge of the United States Tax Court
Washington, DC 20217

cc: Official File - WPFN
Reading File - WPFN
Subject File - WPFN
WPFNR, Sherrie & Mike
WPE, T. Stapleton
WL, Gary Davis

WPFN:JAKaplan:tlj:472-1495:09/22/86

UNITED STATES TAX COURT
400 SECOND STREET N.W.
WASHINGTON, D.C. 20217

OFFICE OF THE
COURT ADMINISTRATOR
(202) 376-2751

April 22, 1987

Renn C. Fowler
Regional Counsel
General Services Administration
Room 7048
7th & D Streets, S.W.
Washington, D.C. 20407

Dear Mr. Fowler:

By letter dated September 2, 1986, I formally requested that your office provide a written opinion as to the legality of constructing a fence around the plaza area at the U.S. Tax Court to prevent all persons, except maintenance personnel, from entering onto the property. A copy of my letter is enclosed for your reference.

Since sending that letter, there have been numerous phone conversations between my staff and Mr. Gary Davis, an attorney with your office, concerning the status of GSA's response to our letter. We were repeatedly informed that an answer would be forthcoming and by letter dated December 8, 1986, we were specifically assured by Mr. Davis that a response would be received before the first of the year. However, more than four months have passed, and no response has yet been received.

In our latest contact with your office, which occurred on April 6, 1987, we were advised that a new attorney had been assigned to handle our request.

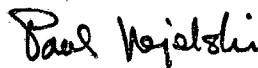
Our efforts as an agency to deal with the problems encountered with people littering the plaza area, consuming liquor on the property, sleeping on the plaza, and destroying the lawn and trees, have been made known to you over the course of the past year. Furthermore, pursuant to our request, several representatives from GSA met with us at the Court on August 18, 1986, and surveyed the property in question. Frankly, since that time, GSA has provided little cooperation in determining what steps can be taken to secure that area, and, specifically, has failed to respond to our letter request of September 2, 1986.

It is apparent that our repeated telephonic inquiries and our letters have simply failed to produce any results.

I am writing again to request your response to our letter of September 2, 1986. If the delay in receiving a response is attributable to other individuals within GSA with whom you must consult, we would certainly be willing to communicate directly with them to expedite an answer to our questions.

I look forward to hearing from you at your earliest convenience.

Sincerely,



Paul Nejelski
Court Administrator

Enclosure

cc: Chief Judge Sterrett
Gary Davis

22 MAY 1987

Dear Mr. Nejelski:

This responds to your requests for my views on whether public use of the plaza area at the U.S. Tax Court can be prohibited by constructing a fence around the area or, in the alternative, whether notices can be posted prohibiting dusk to dawn use of the area. I understand that these proposals are being considered in an attempt to solve the problems caused by people sleeping in the plaza, littering the area, consuming alcohol on the premises, and destroying the lawn and trees. Although I think that a total exclusion of public use, via the construction of a fence, cannot be justified, posting notices prohibiting dusk to dawn use of the plaza is legally permissible.

The plaza, which is situated above Interstate Route 95, is subject to Formal Agreement No. HT 7308 (Agreement) dated November 8, 1973, between the District of Columbia (D.C.) and the General Services Administration (GSA). Two provisions of that Agreement relate to your proposals. First, any change in use requires the prior approval of the Department of Highways and Traffic as well as the concurrence of the Federal Highway Administration. Since the concerns of these organizations are different than those of the Tax Court, your proposals should not cause them a problem. Second, the Agreement also prohibits excluding people from using the plaza on the basis of race, color, or national origin. Your proposals do not exclude people from the plaza for these reasons.

Since the Tax Court plaza is property under GSA's charge and control, it is also subject to the Public Buildings Cooperative Use Act of 1976, 40 U.S.C. §§ 490, 601, 601a, 611, and 612a (1982) ("Cooperative Use Act"). For years, GSA has allowed the public to use areas in and around its buildings for cultural, educational, and recreational activities, such use has recently been codified under the Cooperative Use Act. Needless to say, sleeping in the plaza or littering the area or drinking on the premises or destroying the lawn and trees do not fall under the Cooperative Use Act's definitions of cultural, educational, and recreational activities, See, 40 U.S.C. 612a(6), (7), and (8) (1982).

The Cooperative Use Act aside, the plaza, as a public area, is subject to court decisions concerning use of public areas. When deciding questions regarding a person's right to use Government property, the Supreme Court considers three factors: 1) whether a person has a constitutional right to engage in the proposed activity, 2) whether the area is a public or nonpublic forum, and 3) whether the justification for exclusion, etc., satisfies the requisite standard. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

While constitutionally protected rights do not embrace the activities which you described in your proposal, some of the activities for which the plaza is or will be used are constitutionally protected or would be treated as such in passing upon the validity of your proposals.

With that, the public area becomes the issue. The Court has adopted a forum analysis to determine the test or criteria against which the Government's interest (in limiting use) is weighed. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985). There are three classifications of fora: traditional public fora, designated public fora, and nonpublic fora. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983).

Traditional public fora are areas such as streets, sidewalks, or parks. A primary purpose of these areas is the free exchange of ideas; speakers can be excluded from these areas only if the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. at 45.

Designated public fora are those places intentionally designed as places to be used by the public to exchange views or engage in expressive activities. City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n., 429 U.S. 167 (1976). Speakers cannot be excluded from designated public fora without a compelling governmental interest.

If an area is not a traditional or designated public forum, it is a nonpublic forum. Internal offices are an example of

¹ Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984) held that overnight sleeping in connection with a demonstration is expressive conduct protected to some extent by the First Amendment (emphasis added).

nonpublic fora. Access to nonpublic fora can be restricted as long as the restriction is reasonable. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. at 46.

Against this backdrop, the plaza at the Tax Court is either a traditional or designated public forum. A court may determine the plaza to be a traditional public forum because the inherent characteristics of the plaza are similar to those of the streets and parks. And, as stated by Judge Roberts in Hague v. CIO, 307 U.S. 496, 515 (1939), "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." A court may also look at the Government's intention in creating a plaza and conclude that the area was designed as a place for communication, assembly, and speech. In other words, the area was designated as a public forum.

Only one significant distinction exists between a finding that the plaza is a traditional versus designated public forum. If classified as a traditional public forum, the public can be excluded from using the Tax Court plaza if there is a compelling interest and the exclusion is narrowly drawn to achieve that interest. If classified as a designated public forum, the public can be excluded from the plaza if there exists a compelling Government interest. That is to say, we would not have to prove that the exclusion is narrowly drawn only to achieve the compelling interest.

On balance, I think the Tax Court plaza is a traditional public forum; the characteristics of such an area are similar to streets, sidewalks, and parks. All of these are open-areas in which people walk, communicate, and assemble. Any differences between the Tax Court plaza and streets, sidewalks, and parks appear to be distinctions without significance.

As a traditional public forum, the exclusion of the public from the plaza must, as said, serve a compelling governmental interest, and the exclusion must be narrowly drawn to achieve that purpose. I believe that the Government has a compelling interest in maintaining a healthy and safe environment. It also has a compelling interest in seeing that the property under its charge and control reflects the dignity, enterprise, vigor, and stability of the United States Government. See 41 C.F.R. § 101-19.002(g) (1986). Not only is this the Government's right,

but it is the Government's duty. United States v. Cassiagnol, 420 F.2d 860, 874 (4th Cir., 1970). This duty extends from the architectural design of the building itself to the maintenance and furnishing of the lobbies, auditoriums, individual offices, and the areas around the building. Although Congress, in enacting the Cooperative Use Act, has seen fit to allow the public to occasionally use certain areas of these buildings, that does not change GSA's duty to see that these areas reflect the dignity of the United States Government.

Given that, the issue is whether the proposals are narrowly drawn to achieve the compelling governmental interests. The proposal to construct a fence around the area, thereby excluding everyone from the area, is not sufficiently narrow and will not withstand a challenge in court. Constructing a fence achieves the goal of maintaining the plaza, but it also prohibits any person from using the plaza even if such person's use would not damage the plaza. As stated by the U.S. District Court for the Eastern District of Pennsylvania in Resistance v. Comm'rs. of Fairmount Park, 298 F. Supp. 961, 963 (1969), "The . . . littering of the Plaza and possible damage to trees, shrubs and lamps will not support an absolute prohibition . . . on the premises." Moreover, a total exclusion from the plaza does not leave a person with an alternative forum for communicating its views at the Tax Court. The availability of alternative fora must be considered. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). Consequently, I believe a court would find that a fence is not a solution sufficiently tailored to achieve only the Government's interests.

On the other hand, your proposal to close the plaza from dusk to dawn, via the posting of notices, may withstand a court challenge. That solution is narrowly fashioned in that it achieves the governmental interest in maintaining the plaza without totally excluding everyone from using the plaza. People will be able to use the plaza during the day, thereby assuring an alternative time and place to express views. The nighttime ban is unlikely to violate a person's constitutional rights. While a nighttime ban would preclude someone from, among other things, sleeping overnight on the plaza, the Supreme Court has held that a regulation banning sleeping overnight is not unconstitutional on its face. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Consequently, I see no objection to posting notices in the area prohibiting the dusk to dawn use of the plaza provided, of course, that notification is given to the Department of Highways and Traffic and concurrence is obtained from the Federal Highway Administration as required by the Agreement with D.C.

To prevent littering, sleeping, drinking, and destruction of the plaza during the day, enforcement of GSA's building rules and regulations, 41 C.F.R. § 101-20.3 (1986), can be increased.

Specific sections of the regulations (i.e., 41 C.F.R. §§ 101-20.303, 305, and 307 (1986)) apply to each of the activities listed above. A nighttime ban coupled with vigorous enforcement of GSA's regulations should, I hope, alleviate the problems you have encountered.

Sincerely,

Renn C. Fowler
Regional Counsel

Mr. Paul Nejelski
Court Administrator
U.S. Tax Court
400 Second Street, NW.
Washington, DC 20217



cc:

WL -- Official/Reading Files
WL:VLCrivella:dml:5/22/87:C3-Tax.Court